

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

KELLIE DEFRIES, §
§
Plaintiff, §
§
v. § Civil Action No. 3:22-cv-00549-M
§
MSB TRADE INC., et al., §
§
Defendants. §
§
§

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiff's Motion for Default Judgment. ECF No. 122. Plaintiff seeks entry of default judgment against Defendants alyer, annbay ltd, aoshang, audab store, barney/skd-us, beautychen, deskoti, enzo-missdeer-us, gao yongxue-yongusuus, gu bingding-eyxformula, honoson, jackshen-mooerca us, jinhua cao-ztl fashion, lisihua-jiasheng direct, magic c-moibase gel polish, njqianrou-nanjingqianroubuliaoyouxiangongsi, qiaocrystal-shiny crystal, subay-subay direct, tangsanyuan ba, tatuo us, tianping liu-biutee store, tianshui wang-over the hills, xin huang-angnya nails, xinqitong, xiulin dai-yokilly beauty, xushujun-kang yue trading, yao angela-honey joy beauty & health, zhang zhaoqin-juanzhizong, zhouyanghao, zhujunjie-hzsbbass store (collectively, "Defaulting Defendants"). On July 24, 2024, the Court held an evidentiary hearing on the Motion for Default Judgment.

Upon review of the Motion and supporting documentation, and for the reasons stated on the record during the hearing, the Court finds that the Motion should be **GRANTED IN PART**, and that Plaintiff is entitled to a reasonable royalty to compensate for past infringement. Plaintiff's requests for a permanent injunction, enhanced damages, and pre-judgment interest are

DENIED. Plaintiff's claims against all Defendants other than the Defaulting Defendants are **DISMISSED WITH PREJUDICE.**

Federal Rule of Civil Procedure 55 provides for entry of a default and default judgment when a party against whom judgment for affirmative relief is sought has failed to plead or otherwise defend. Fed. R. Civ. P 55(a). "Default judgment is proper only if the well-pleaded factual allegations in the . . . Complaint establish a valid cause of action." *United States v. 1998 Freightliner Vin #:* IFUYCZYB3WP886986, 548 F. Supp. 2d 381 (W.D. Tex. 2008); *see also Nishimatsu Const. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("There must be a sufficient basis in the pleadings for the judgment."). After the clerk enters a default, "the plaintiff's well-pleaded factual allegations are taken as true, except regarding damages." *U.S. For Use of M-Co Constr., Inc. v. Shipco Gen., Inc.*, 814 F. 2d 1011, 1014 (5th Cir. 1987).

In considering a motion for default judgment, the Court will consider (1) whether the entry of default judgment is procedurally warranted, (2) whether a sufficient basis in the pleadings based on the substantive merits for judgment exists, and (3) what form of relief, if any, a plaintiff should receive. *Lindsey v. Prive Corp.*, 161 F.3d 886, 893 (5th Cir. 1998). Here, the Court has considered the factors set forth in *Lindsey* and concludes that entry of default judgment is procedurally warranted, and that the Defaulting Defendants have been properly served but have not appeared.

In addition, the Court has evaluated the allegations in the First Amended Complaint and determines that a substantive basis for judgment exists. Plaintiff is the named inventor on five asserted patents: two utility patents¹ and two design patents.² Specifically, Plaintiff alleges that

¹ Specifically, U.S. Patent Nos. 10,308,005 ("005 patent") and 10,967,625 ("625 patent"). Plaintiff no longer seeks recovery as to U.S. Patent 10,675,852 ("852 patent"). See ECF No. 122 at 5.

² Specifically, U.S. Patent Nos. D867,838 ("838 patent"), and D867,839 ("839 patent").

the Defaulting Defendants have infringed claims 1, 9–11 of the '005 patent, claim 1 of the '625 patent, claim 1 of the '838 patent, and claim 1 of the '839 patent (collectively, the “asserted claims”). The Court has reviewed the First Amended Complaint and the evidence presented by Plaintiff, including Plaintiff’s testimony at the hearing, and concludes that Plaintiff has established direct infringement of the asserted claims by the Defaulting Defendants through sales of products associated with the following ASINs,³ the “accused ASINs”:

B09TQMRHQ7	B08LPR3JKS	B07X632YLD	B07DTB2CBR
B09TQMC8L5	B08LBL4JMG	B07V42WKQZ	B07CWB7YFX
B09S9N7SF9	B08FTBZG36	B07T7DJ1FV	B07CNF6FB1
B09LD4W3RH	B08FSJSLFG	B07T65M5S5	B07C2TCZHH
B09KR9BDBH	B08D67VZYC	B07QR976Z9	B07BXFSC87
B093H1LCTH	B08BC8RJHW	B07PXHNLNQ4	B07BK1TMH4
B091KZPD17	B08B37BVLC	B07PWC7VK3	B077GNC8FT
B0912H7RB2	B08B34P513	B07PVHGTPP	B076M1F81T
B08XXZL83D	B088NTNLT1	B07P6G7356	
B08XBG4Z46	B085RQKWNF	B07KCRGZBN	
B09TQMRHQ7	B0827VWDS9	B07HQ5NXC9	
B08V5MNQR7	B08LPR3JKS	B07X632YLD	

See ECF No. 122-5.

The Court proceeds to Plaintiff’s requested relief. Damages for patent infringement are governed by 35 U.S.C. § 284, which provides, in pertinent part, that “the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer.” 35 U.S.C. § 284. The patentee bears the burden of proving damages. *Dow Chem. Co. v. Mee Indus., Inc.*, 341 F.3d 1370, 1372, 1381 (Fed. Cir. 2003). “A reasonable royalty is the amount that ‘a person, desiring to manufacture [, use, or] sell a patented article, as a business proposition, would be willing to pay as a royalty and yet be able to make [, use, or] sell the patented article, in the market, at a

³ An “ASIN” is a unique identifier specific to the Amazon.com platform; each product sold on Amazon has a unique ASIN assigned to it. ECF No. 34 (“FAC”) ¶ 42.

reasonable profit.’’ *Applied Med. Res. Corp. v. U.S. Surgical Corp.*, 435 F.3d 1356, 1361 (Fed. Cir. 2006) (alterations in original) (quoting *Trans–World Mfg. Corp. v. Al Nyman & Sons, Inc.*, 750 F.2d 1552, 1568 (Fed. Cir. 1984)).

The Court determines that a reasonable royalty is the appropriate measure of damages in this case.⁴ Plaintiff requests that the Court enter a reasonable royalty similar to license agreements previously entered into between Plaintiff and other accused infringers of the asserted claims. Plaintiffs provide a representative license agreement that states, ‘‘As long as Defendant wishes to sell application tools identified by [ASIN], or functional and design equivalents thereof, the Defendant shall pay the Plaintiff a royalty rate of \$1,000 per month or 3% of gross proceeds per month, whichever is higher. This agreement shall terminate upon Defendant ceasing payments.’’ ECF No. 122-4 at 2. During the hearing, Plaintiff testified that royalty rates between 3% and 5% of gross proceeds are typical for license agreements in this industry and market.

The Court notes that although Plaintiff requests a royalty to be calculated on a per month basis, Plaintiff has only provided data for the Defaulting Defendants’ gross proceeds on a quarterly basis, and incomplete data at that.⁵ Thus, because Plaintiff has not provided data from which the requested royalty can be calculated on a monthly basis, the Court will amend Plaintiff’s request to reflect royalties to be paid on a quarterly basis. In addition, contrary to Plaintiffs’ request, royalties for past infringement shall be paid only for the quarters in which

⁴ In her Motion for Default Judgment, Plaintiff sought to recover lost profits. ECF No. 122. During the hearing, the Court determined that an award of lost profits was not appropriate as a matter of law, after evaluating the factors set forth in *Panduit. Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1545 (Fed. Cir. 1995) (en banc) (citing *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 575 F.2d 1152 (6th Cir. 1978)).

⁵ Plaintiff has provided evidence of gross proceeds for Q3 of 2020 through Q4 of 2023. ECF No. 122-2. As the Court noted during the hearing, the data provided by Plaintiff in Ex. B, Infringer Quarterly Gross Profit, does not provide data for every quarter, and instead omits certain quarters for seemingly no reason. See ECF No. 122-2.

Plaintiff has provided evidence of a royalty base, *i.e.*, evidence of gross proceeds by a particular Defendant.⁶

For the foregoing reasons, the Court grants Plaintiff's request for a reasonable royalty as follows. As long as a Defaulting Defendant wishes to sell products identified by the accused ASINs, the Defendant shall pay Plaintiff a royalty rate of \$1,000 per quarter or 5% of gross proceeds per quarter, whichever is higher. There is no obligation for any Defaulting Defendant to pay a royalty for any month in which it makes no infringing sales under the accused ASINs.

Based on this royalty rate, the Court calculates Plaintiff's damages for infringement through the date of Plaintiff's Motion for Default Judgment as follows:

Defaulting Defendant	Total Damages
alyer	\$2,000.00
annbay ltd	\$1,000.00
aoshang	\$8,710.98
audab store	\$7,000.98
barney/skd-us	\$1,000.00
beautychen	\$1,000.00
deskoti	\$7,134.93
enzo-missdeer-us	\$1,000.00
gao yongxue-yongusuus	\$1,000.00
gu bingding-eyxformula	\$2,000.00
honoson	\$5,515.50
jackshen-mooerca us	\$1,000.00
jinhua cao-ztl fashion	\$1,000.00
lisihua-jiasheng direct	\$1,000.00
magic c-moibase gel polish	\$1,000.00
njqianrou-nanjingqianroubuliaoyouxiangongsi	\$1,000.00

⁶ In her proposed form of judgment, Plaintiff appears to have calculated the royalty amount per month regardless of whether there is evidence that the particular Defaulting Defendant in question made any sales under the accused ASINs. For example, Plaintiff's evidence indicates that Defaulting Defendant "annbay ltd" made \$91.40 in gross proceeds based on infringing sales in Q3 of 2020, but did not make any other sales. ECF No. 122-2 at 2. Despite this, Plaintiff calculates the royalty amount for annbay ltd. to be \$47,000, seemingly based on a \$1,000 per month royalty for every month from Q3 of 2020 through Q4 of 2023. When compared to the relatively minimal infringement alleged, such a disproportionate royalty is clearly not reasonable, and far exceeds what is necessary to compensate for the infringement. *See Applied Med. Res. Corp.*, 435 F.3d at 1361 ("[R]easonable royalty damages are not calculated in a vacuum without consideration of the infringement being redressed."). Plaintiff is not entitled to a royalty when there is no infringement.

qiaocrystal-shiny crystal	\$1,000.00
subay-subay direct	\$21,313.02
tangsanyuan ba ⁷	-
tatuo us	\$6,599.60
tianping liu-biutee store	\$1,000.00
tianshui wang-over the hills	\$1,000.00
xin huang-angnya nails	\$5,000.00
xinqitong	\$2,000.00
xiulin dai-yokilly beauty	\$7,269.79
xushujun-kang yue trading	\$1,000.00
yao angela-honey joy beauty & health	\$4,021.50
zhang zhaoqin-juanzhizong	\$1,000.00
zhouyanghao	\$2,000.00
zhujunjie-hzsbbass store	\$1,000.00

See Exhibit A.⁸

For the reasons stated on the record, Plaintiff's request for enhanced damages based on willful infringement is denied. In addition, Plaintiff's request for pre-judgment interest is denied. “[I]t may be appropriate to limit prejudgment interest, or perhaps even deny it altogether, where the patent owner has been responsible for undue delay in prosecuting the lawsuit.” *See General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 657 (1983). Here, the Court notes that Plaintiff's prosecution of this lawsuit was somewhat dilatory in nature, in that on occasion, she failed to effectuate and establish service of Defendants, or seek entry of default and default judgment, until prompted by the Court.⁹ E.g., ECF Nos. 29, 91.

Finally, in addition to monetary damages from the Defaulting Defendants, Plaintiff sought a permanent injunction against numerous other Defendants for whom there is insufficient

⁷ Defaulting Defendant “tangsanyuan ba” is not listed on Plaintiff's Ex. B, Infringer Quarterly Gross Profit, and Plaintiff provides no other evidence of gross proceeds of this Defendant. Accordingly, Plaintiff has not established her entitlement to any royalty from this Defendant.

⁸ To calculate Plaintiff's royalties, the Court used the gross proceed figures provided by Plaintiff in support of her Motion for Default Judgment. *See* ECF No. 122 (“Ex. B, Infringer Quarterly Gross Profit”). The Court notes that Plaintiff only provided evidence of gross proceeds through Q4 of December 2023.

⁹ Much of the delay in this case stemmed from Plaintiff's decision to name over two-hundred Defendants in this lawsuit, which resulted in significant administrative inefficiencies and complications regarding service and proof of service, but has only sought default judgment as to these particular thirty Defaulting Defendants.

or no evidence of gross sales of infringing products. During the hearing, the Court denied Plaintiff's request for a permanent injunction. Accordingly, since Plaintiff is now only seeking relief from the Defaulting Defendants, all Defendants except for the Defaulting Defendants are hereby **DISMISSED WITH PREJUDICE.**

The Court will enter a separate final judgment consistent with this Order.

SO ORDERED.

August 2, 2024.



BARBARA M. G. LYNN
SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT A

Defaulting Defendant	2020 Q3 Gross Profits	2020 Q3 Royalty	2021 Q1 Gross Profits	2021 Q1 Royalty	2021 Q3 Gross Profits	2021 Q3 Royalty	2021 Q4 Gross Profits	2021 Q4 Royalty	2022 Q1 Gross Profits	2022 Q1 Royalty	2022 Q2 Gross Profits
alyer			3208.41	1000.00	45.54	1000.00					
annbay ltd	91.40	1000.00									
aoshang			29547.00	1477.35	13402.65	1000.00	13584.50	1000.00	40703.43	2035.17	23969.16
audab store			20019.69	1000.98	7832.97	1000.00	6353.79	1000.00	14769.63	1000.00	14769.63
barney/skd-us							2403.66	1000.00			
beautychen											
deskoti					29051.61	1452.58	69816.66	3490.83			
enzo-missdeer-us							1748.25	1000.00			
gao yongxue-yongusuus							719.10	1000.00			
gu bingding-eyxformula							9427.55	1000.00	13606.38	1000.00	
honoson	5031.00	2515.50	4611.87	1000.00	2912.76	1000.00	1156.46	1000.00			
jackshen-mooerca us							5958.48	1000.00			
jinhua cao-ztl fashion	23.98	1000.00									
lisihua-jiasheng direct							1949.75	1000.00			
magic c-moibase gel polish							718.20	1000.00			
njqianrou-nanjingqianroubuliaoyouxiangongsi							3533.45	1000.00			
qiaocrystal-shiny crystal							5345.31	1000.00			
subay-subay direct			99753.57	4987.68	87045.00	4352.25	166846.53	8342.33			
tangsanyuan ba											
tatuo us					46746.00	2337.30	85246.02	4262.30			
tianping liu-biutee store							808.65	1000.00			
tianshui wang-over the hills											
xin huang-angnya nails							566.37	1000.00	1618.20	1000.00	943.95
xinqitong					2471.25	1000.00	1245.51	1000.00			
xiulin dai-yokilly beauty							15376.76	1000.00	32903.40	1645.17	22600.86
xushujun-kang yue trading0							8150.18	1000.00			
yao angela-honey joy beauty & health	20430.00	1021.50	719.10	1000.00	209.70	1000.00					
zhang zhaoqin-juanzhizong			8765.46	1000.00							
zhouyanghao					642.06	1000.00	1115.00	1000.00			
zhujunjie-hzsbsass store											

Defaulting Defendant	2022 Q2 Royalty	2022 Q4 Gross Profits	2022 Q4 Royalty	2023 Q1 Gross Profits	2023 Q1 Royalty	2023 Q2 Gross Profits	2023 Q2 Royalty	2023 Q4 Gross Profits	2023 Q4 Royalty	Total Royalties
alyer										\$ 2,000.00
annbay ltd										\$ 1,000.00
aoshang	1198.46	7915.05	1000.00	13473.00	1000.00					\$ 8,710.98
audab store	1000.00	17630.74	1000.00	14108.87	1000.00					\$ 7,000.98
barney/skd-us										\$ 1,000.00
beautychen		239.76	1000.00							\$ 1,000.00
deskoti		2085.39	1000.00					23830.41	1191.52	\$ 7,134.93
enzo-missdeer-us										\$ 1,000.00
gao yongxue-yongusuus										\$ 1,000.00
gu bingding-eyxformula										\$ 2,000.00
honoson										\$ 5,515.50
jackshen-mooerca us										\$ 1,000.00
jinhua cao-ztl fashion										\$ 1,000.00
lisihua-jiasheng direct										\$ 1,000.00
magic c-moibase gel polish										\$ 1,000.00
njqianrou-nanjingqianroubuliaoyouxiangongsi										\$ 1,000.00
qiaocrystal-shiny crystal										\$ 1,000.00
subay-subay direct		50970.48	2548.52	21644.91	1082.25					\$ 21,313.02
tangsanyuan ba										\$ -
tatuo us										\$ 6,599.60
tianping liu-biutee store										\$ 1,000.00
tianshui wang-over the hills		5489.64	1000.00							\$ 1,000.00
xin huang-angnya nails	1000.00	2923.03	1000.00	4954.64	1000.00					\$ 5,000.00
xinqitong										\$ 2,000.00
xiulin dai-yokilly beauty	1130.04	28183.68	1409.18	41707.80	2085.39					\$ 7,269.79
xushujun-kang yue trading0										\$ 1,000.00
yao angela-honey joy beauty & health			800.10	1000.00						\$ 4,021.50
zhang zhaoqin-juanzhizong										\$ 1,000.00
zhouyanghao										\$ 2,000.00
zhujunjie-hzsbsass store		19193.25	1000.00							\$ 1,000.00